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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 644

AMERICAN STEVEDORES, INC., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated December 7, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, American Stevedores, Inc., through its attorney, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case November 14, 1962.

OPINION BELOW

Reprinted as Appendix A to this Petition is the Opinion of the United States Court of Appeals for the Second Circuit.

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit, on November 14, 1962, affirmed a judgment of conviction following a jury trial entered by the United States District Court for the Southern District of New York on May 4, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 145(b) of the Internal Revenue Code of 1939 and 26 U.S.C. section 7201 which provide that:

> ". . . any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000.00, or imprisoned not more than five years or both, together with the costs of prosecution."

STATEMENT OF THE MATTER INVOLVED

The judgment of the Court of Appeals sought to be reviewed, affirmed a judgment of conviction entered by the United States District Court for the Southern District of New York, for violation of the Internal Revenue Code of 1939, § 145(b); 26 U.S.C.A. § 7201.

The indictment involving the petitioner was handed down by a Federal Grand Jury for the District Court on March 31, 1954, and consisted of ten counts. The first two counts charged that for the calendar taxable years 1950 and 1951, American Stevedores, Inc., the petitioner here, and its four stockholders, all brothers, three of whom were its principal officers, directors, and

operators, did, unlawfully, willfully and knowingly attempt to evade Federal income taxes due and owing by American Stevedores, Inc., by filing false and fraudulent income tax returns for the aforesaid years in violation of Section 145(b) Internal Revenue Code; 26 U.S.C. Section 7201. The old father of the four brothers, its nominal president but not a stockholder, was likewise charged but because of his health was, upon motion made, granted a severance and has not been tried, the Court below in charging the jury stated that he should no longer be considered a defendant and that the jury's only concern should be the corporation, and the four brothers as its principal officers and stockholders. (Appendix C) The father was not charged in any of the 8 remaining counts wherein the brothers as individuals were charged with having willfully evaded their individual income taxes for the years 1950 and 1951 in violation of Section 145(b) Internal Revenue Code; 26 U.S.C., Section 7201.

The gravamen of all ten counts of the indictment was those personal expenses of its officers, directors, and sole stockholders which were paid for by the petitioner.

In the first two counts of the indictment these expenditures were considered as unallowable business expenses of the corporation and formed the basis of the additional corporate income and resulting additional corporate taxes which the Government charged that the petitioner and its four principals both had willfully attempted to evade for the taxable years 1950 and 1951.

In the remaining eight counts of the indictment these disallowed expenditures were considered as unreported dividends determined on a pro rata basis

which the four brothers had willfully failed to report and pay a tax upon in their respective individual income tax returns for 1950 and 1951.

Eight years almost to the day after the indictment was handed down the trial of the cases commenced in the District Court on March 12, 1962. On April 5, 1962, the jury returned the following verdict:

> On the first two counts alleging evasion of corporate tax
>
> a—Petitioner—Guilty
>
> b—The four brothers—Not Guilty
>
> On the remaining eight counts involving the individual income tax liability of the four brothers only
>
> c—The four brothers—Not Guilty.

The court of appeals seems to have concluded that the jury could have consistently found from the same evidence that the corporation's four principals were innocent on all ten counts inclusive of the first two counts but that the corporation alone was guilty under said two counts of having willfully evaded its corporate Federal income tax.

Completely ignored by the Court was the fact that a willful attempt to evade tax is a felony, malum in se, and arising from an evil purpose and intent to commit a wrongful act.

We stress the need of a conscience to supply this so necessary evil intent and purpose to a conviction of the corporate defendant. We have pointed out to the Court below that this Court long ago has said that the willfulness essential to a conviction under Section

145(b) of the Code must be motivated by a bad purpose which is tantamount to saying it must be motivated by an evil purpose and intent. *United States* v. *Murdock*, 290 U.S. 389; 54 S. Ct. 223. We have heretofore asked the Court of Appeals to recognize the fact that a corporate entity has no conscience of its own with which to connive the commission of an evil act and that in this respect the consciences of its principals alone can connive such an act and thereby bind it. We further pointed out that if an employee or agent had committed the evil act, the corporation was not responsible unless its *principals* had condoned or directed the evil act.

QUESTIONS PRESENTED

Whether the Court of Appeals should have found that:

(a) A corporate entity has no conscience.

(b) A conscience is necessary to formulate an evil or bad purpose, i.e. a willful attempt to evade tax.

(c) The conscience of a corporate entity abides in the consciences of its principals, and their evil acts committed on its behalf are binding upon it.

(d) If its principals in their consciences were innocent of any wrongful intent on the corporation's behalf, the corporation must also be innocent and guiltless.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Court of Appeals should have considered, and answered affirmatively all of the above questions and reversed the conviction in the District Court below.

2. The above questions involve matters affecting Federal law which have not heretofore been considered di-

rectly by this Court and which now should be settled by it.

3. The decision of the Appellate Court herein appears to be in conflict with applicable decisions of this court, in particular *United States* v. *Murdock,* 290 U.S. 389, 54 S. Ct. 223; *Spies* v. *United States,* 317 U.S. 492; *United States* v. *Martell,* 199 Fed. 2d 670, cert. den. 345 U.S. 17.

CONCLUSION

The petitioner with no conscience of its own could not act evilly or with a bad purpose in a willful attempt to evade and defeat the payment of its income tax. Its conscience abode in the consciences of its principals. They only could have committed the evil act of willfully attempting to evade the corporate tax which would have made it guilty.. Since the jury found the principal officers and stockholders innocent of the charge they should have found likewise as to the petitioner. Not having done so, the District Court should have set aside the jury's verdict of guilty as to the petitioner and found the Petitioner not guilty. On the same score, the Court of Appeals should not have affirmed but should have set aside the verdict of the District Court and directed a verdict of not guilty in the case of Petitioner.

The Writ of Certiorari should be granted.

Respectfully submitted,

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